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THE LEGAL ASPECT OF MONOPOLY.

MONOPOLY and competition are contrasted so constantly in current discussion as representing opposite and antagonistic business conditions that it is sometimes forgotten that, even under competitive conditions, the aim of each competitor is the sale of his own goods, or the securing of his own services, to the exclusion of those of some one else. Peculiar success, for any reason, of one competitor in the industrial war is a disadvantage, for the time at least, to others, and the reward of the successful is a larger business, increase in size and power to maintain the position already won. For size itself is an advantage in the competitive struggle and an aid to the exclusion of competitors. Not only does it afford greater economy in production and management, but the large concern, operating in a wide territory, can drive out one by one smaller competitors, operating in narrower territory, by simply cutting prices within the smaller field while making a profit elsewhere.[1] This may be a strictly competitive method of warfare, and completely successful from the point of view of the large concern, but it does not insure that the public will receive the best or the most economical service.

Inasmuch as size is in itself an advantage in the competitive struggle, the temptation is to accomplish it, not by the slower and more uncertain process of individual growth through successful

[1] This consideration has led one economic writer to the conclusion that the evils of monopoly can be largely, if not entirely, avoided by merely requiring the large concern to make its prices uniform throughout the territory in which it operates, thus making the undue cutting of prices a greater risk to the large than to the small concern. See The Problem of Monopoly, by Prof. J. B. Clark.

competition, but by means of the combination and union in some form of actual competitors. Such a combination not only accomplishes greater size, but at the same time eliminates actual competition previously existing, and thus makes the position of the united interests, for the moment at least, the more secure and powerful. In fact, in organizing such a combination of competitors, the aim generally is to eliminate by means of the combination enough competition so that the united interests will be reasonably safe from such other existing competition as there may be, or, in other words, have a present control of the particular industry or market in which the parties operate. Unless such control is in fact accomplished, size may ultimately prove to be a disadvantage, for the disadvantage of size lies in the fact that it means more to lose. A successful competitor is a greater danger to a large than to a small concern just because of the greater investment which the big concern represents. If economies in management on the side of the large concern are more than offset by newer methods or other advantages on the part of a smaller competitor, then the large concern, which is bound to maintain its position at all hazards, must rely finally upon its power to dominate and control the market, and make use of its size as a competitive weapon to exclude and crush competition which might otherwise prove dangerous to it just because it would be beneficial to the consumer. Its warfare is not waged primarily in the interests of the public, and its success by such means may be the public's loss.

For the purpose of the present article the important point to notice is that monopoly, viewed as size sufficient to give control of the market in a particular trade or industry, may be accomplished in more than one way, though no doubt the method by which most of the large corporations are formed at the present day is by the combination or union of former competitors, and not by individual growth merely. Does the law object to size, control of the market, in itself, or only to particular methods of accomplishing size, or is size not taken into account at all? These are the questions which it is proposed to consider in the following pages. The problem obviously concerns itself primarily with the legality of transactions between competitors, using that word to mean rivals in the same line of business. Starting, therefore, with a consideration of the invalidity, because in restraint of trade, of certain contracts between competitors, an attempt will be

made in the first place to distinguish between contracts of sale between competitors, and contracts for the purpose of regulating and controlling the conduct of their competing interests, before considering finally the legality of a more intimate union of the business of such rivals.

I.

Professor Gray [1] has criticised the position taken by Mr. Justice Holmes in his dissenting opinion in the Northern Securities case on the ground that common law contracts in restraint of trade were contracts which inflicted a detriment upon the conduct of the business of one party for the benefit of the other party, while the cases arising under the Sherman Act which had been already decided by the Supreme Court [2] had extended the principle to include contracts which had for their object the conferring of benefits upon all the parties to the agreement, and not the infliction of a detriment on the business of some or one of the parties. And his contention was that if these decisions were accepted as binding (and Justice Holmes did explicitly so accept them), then the result arrived at in the Northern Securities case was a foregone conclusion. But even the English authorities [3] have not defined contracts in restraint of trade so narrowly as is here stated, and the prevailing view in this country has certainly included in the class of contracts which are invalid as in restraint of trade on common law principles, contracts which limit or restrain competition in some form between the parties, although the object of the contract is to confer a benefit upon the business of all the parties to it.[4]

Mr. Justice Holmes, in the opinion referred to,[5] defines common law contracts in restraint of trade as "contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise

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[1] 17 HARV. L. REV. 474.

[2] U. S. *v.* Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505, and Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211.

[3] Hilton *v.* Eckersley, 6 E. & B. 47; Urmston *v.* Whitelegg, 63 L. T. (N. S.) 455.

[4] Stanton *v.* Allen, 5 Den. (N. Y.) 434; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Nester *v.* Continental Brewing Co., 161 Pa. St. 473; Craft *v.* McConoughy, 79 Ill. 346; More *v.* Bennett, 140 Ill. 69. And see Judge Taft's opinion in U. S. *v.* Addyston Pipe & Steel Co., 85 Fed. Rep. 271, 288-290.

[5] 193 U. S., at 404.

he would." This definition suggests another question. It may include other contracts than those merely which inflict a detriment upon the conduct of the business of one of the parties, but, by its terms, it certainly does at least include that kind of a contract. The most common instance at common law of a contract in restraint of trade was a restrictive covenant, in connection with the sale of a business, prohibiting the seller from prosecuting his business in the future in competition with the buyer. Yet such restrictive covenants are now held by the Supreme Court,[1] in a case in which Mr. Justice Holmes delivered the opinion, not to be within the Sherman Act, although that act includes — as has always been insisted by the majority of the court in the different cases arising under the Sherman Act, and as Mr. Justice Holmes again pointed out in his dissenting opinion in the Northern Securities cases — "every" contract in restraint of trade. The result seems to be that, not only is the Sherman Act not directed against those contracts *only* which inflict a detriment upon the conduct of the business of one tradesman for the benefit of another, but the commonest example of such a contract is not within the prohibition of the Sherman Act at all. In other words, contracts which impose only a restriction upon the conduct of business by one party for the benefit of the other may not be contracts in restraint of trade at all, while *all* contracts which impose a restriction upon the business of both parties — limit competition between them in the supposed interests of both — are in restraint of trade and illegal. The reason for this result, and the ground of the distinction between restrictive covenants in connection with the sale of a business and contracts limiting or restricting competition between competitors, have not received the attention they deserve.

II.

It is commonly stated that restrictive covenants accompanying the sale of a business are valid because the limitation upon competition is incidental and collateral to the real object of the contract, which is the sale of business property, and that the restrictive covenant is unobjectionable in so far as it serves to insure the enjoyment of the property sold. Such covenants are not limited,

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[1] Cincinnati Packet Co. *v.* Bay, 200 U. S. 179. See also Brett *v.* Ebel, 29 N. Y. App. Div. 256; and for similar decisions under other anti-trust acts, see Espenson *v.* Koepke, 93 Minn. 278; Gates *v.* Hooper, 39 S. W. Rep. 1079 (Tex.).

however, to cases where there is an actual transfer of tangible property. All the business that there is to sell may, in some cases, be the competition, and the restrictive covenant will then constitute the whole of the undertaking. And even where there is a transfer of property the purchaser is not bound to make use of it. It has never been suggested[1] that his right to enforce the covenant was conditional upon his continuous use and employment of the property or instruments of competition purchased. The restrictive covenant protects the *business* sold, not the use merely of particular property transferred under the terms of the sale. It may have been the competition that the purchaser was most desirous of buying, and if the vendor was willing to sell, for the price offered, his power to prosecute his existing and established business, the vendee was entitled to buy it.

Cases involving the sale of a business by means of a covenant to discontinue competition are not unusual. The most common instances have been sales of professional business, where there usually was no property to transfer. The business was all good will, — an established competition. A recent New York case[2] affords a good illustration of the sale of a business by means merely of an agreement to discontinue competition. In that case one party, in consideration of the promise of the other to make a monthly payment, agreed to give up the business of dealing in moulding sand from sand banks in the county of Albany and not to engage further in the business personally or as agent for any one else. In holding the agreement valid the court says:

"Heretofore, in most of the cases which have come before the courts, the covenant to refrain from a calling within a territory described, accompanied a sale of the business itself, with all its appliances or appurtenances. For obvious reasons that would be so; but, if the calling be one which is followed without a business plant, is any principle of public policy the more violated by a covenant to discontinue it? Clearly not, and this court has not held to that effect."

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[1] Unless possibly in Western Wooden-Ware Ass'n *v.* Starkey, 84 Mich. 76, where it seems to be intimated that the sale of a business, for a sufficient consideration, which involved the abandonment of the manufacturing plant of the vendor, would be invalid. In other words, the owner of a business may not sell out to a competitor unless the purchaser will maintain the identical property used by the seller, though of course the owner might abandon his business if unprofitable.

[2] Wood *v.* Whitehead, 165 N. Y. 545. See also Brett *v.* Ebel, 29 N. Y. App. Div. 256.

And in the recent case in the United States Supreme Court[1] already referred to, where it was objected that the restrictive covenant was invalid because it was not collateral to a sale of good will, Mr. Justice Holmes used this language:

"It is said that there is no sale of good will. But the covenant makes the sale. *Presumably all that there was to sell*, beside certain instruments of competition, *was the competition itself*, and the purchasers did not want the vendors' names."

It is not accurate, therefore, to say that a restrictive covenant is valid only when and because it accompanies and is collateral to a sale of business property or good will. On the contrary, the restrictive covenant by itself may accomplish the sale of all the business there is to sell, and in every case of a sale of business the restrictive covenant must be regarded as making the sale of a part at least of the business and good will sold. The competitive power of an existing business may be the essence of its good will. A person engaged in business in a particular locality, a physician for instance, located and doing business in a particular town, could not at the same time conduct a second business of the same kind within the same territory which should be in fact a rival and competitor of the first. The opening of a second office for the same purpose in the same town would not mean the beginning of a new business. Consequently, if the whole of such a business, good will and all, is to be sold to another party, the right of the seller to prosecute afterwards what would be, in fact, but a continuation of the business sold, must be excluded.[2] A covenant prohibiting that would obviously be essential to an actual sale of the business.

As a person could not, before the sale of his business, conduct a second similar business which should compete with the first, it follows that, after the sale of the first business (if public policy does not prohibit a man from realizing the full value of his established business by sale), there is no reason why the seller should be permitted to conduct a second business in all respects like the first. He cannot claim that public policy should permit him to

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[1] Cincinnati Packet Co. *v.* Bay, 200 U. S. 179.

[2] This is so clear that the Massachusetts Supreme Court has held that upon the sale of the business of a physician with its good will a restrictive covenant would be implied. Dwight *v.* Hamilton, 113 Mass. 175. The fact that the courts do not, in the ordinary case of the sale of business property and good will, imply such a covenant, does not mean that such a covenant when made is not, in fact, instrumental in conveying a part of the business of the vendor.

sell his business and keep it too. There can be no doubt that it is this aspect of the matter that has influenced the more liberal attitude which the courts, in the more recent decisions, have assumed toward restrictive covenants in connection with the sale of a business. And in this view of it, it seems clear that the restrictive covenant is no more a contract in restraint of trade than is the simple agreement of a vendor to sell all of the business which he has.

It should seem clear, also, that if a man may sell all of the competition which his existing business fairly represents, there can be no objection, on the score of public policy, to his selling only a part of his business or competition. In the view of the earlier cases, apparently the less sold the better. Certainly a man engaged in business in two places might sell his business or competition in one of them and retain it in the other. The result would be the same as if he had originally had a business only in one place and had sold that, with a restrictive covenant covering that territory, and had immediately resumed business in the other place. And clearly public policy would be no more infringed by the sale of part of a single business which extended throughout both places. Would there be any objection to a contract between competitors whereby one party, in consideration for the agreement of the other party to discontinue business, we will say, in New York, agreed on his part to discontinue business in New Jersey?[1] Would that be a sale of part of a business and valid, or a contract limiting competition and invalid?

As we shall have occasion to see later in discussing contracts limiting competition, the distinction between contracts falling within that class and contracts of sale is not one that is always easily drawn, and the authorities frequently fail to discriminate them properly. Such a leading case, for example, as that of Arnot *v.* Pittston & Elmira Coal Co.,[2] presents difficulties in this respect that are commonly overlooked. There a Pennsylvania coal company, also doing business in New York, agreed for one season to take at the market price as much as two thousand tons of coal a month from a rival Pennsylvania coal company, provided the vendor would agree during that time not to sell coal to any

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[1] Such an agreement was sustained in Wickens *v.* Evans, 3 Y. & J. 318. See Judge Taft's comment in the Addyston Pipe Company case, 85 Fed. Rep. 284. And a similar contract was sustained as a sale in National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272.

[2] 68 N. Y. 558. See also Mill & Lumber Co. *v.* Hayes, 76 Cal. 387.

other dealer to come north of the Pennsylvania state line. The contract was held illegal. It was admitted that an absolute sale of any quantity or of all the coal of the vendor to a rival dealer, even though the object of the purchaser was to secure a monopoly and the vendor knew it, would have been valid. "But — and this is a very important distinction," — says the court, "if the vendor does anything beyond making the sale to aid the illegal scheme of the vendee" the contract is invalid. In other words, the agreement by the vendor to relinquish his competition with the vendee in New York, in consideration for the promise of the vendee to purchase a considerable proportion of the vendor's output of coal — apparently considered a good bargain by the vendor — was invalid and the contract unenforceable. And yet, an agreement to sell all the coal the vendor should produce, said by the court to be valid, would involve a restrictive covenant not to sell to any one else, and would be still more effective to accomplish the monopoly aimed at by the vendee. Apparently the vendor could sell all or a part of his coal and all of his competition, but not a part only of the latter.

Should the fact that the vendee in this New York case was seeking to obtain control of the New York coal market be sufficient to account for the result? If so, then a contract to sell the entire output of the vendor's mines should be invalid for the same reason. This the New York court does not hold, but, in spite of the fact that engrossing the market is repeatedly said to be an obsolete offense,[1] there are a number of recent cases where other courts have refused to enforce, as between the parties, contracts of sale where the object of the purchaser was to obtain control of some particular market.[2]

These cases apparently rest upon the principle that contracts of sale between competitors, which have for their object the entire or partial removal of a competitor from business, will not be enforced by the courts if the direct result of their enforcement will be to give control of the market to the purchaser. We have seen that a restrictive covenant in such cases is ordinarily as much a part of the contract for the sale of the business as the agreement to transfer tangible property. So long as either remains unexecuted they stand upon the same footing. If, under the circumstances above

[1] Davis *v.* A. Booth & Co., 131 Fed. Rep. 31, 37.

[2] Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103; Richardson *v.* Buhl, 77 Mich. 632; Pacific Factor Co. *v.* Adler, 90 Cal. 110.

indicated, the restrictive covenant would not be enforced, there would be the same reason for refusing to enforce the agreement to sell the rest of the business or property. These cases, therefore, which hold the sale of the property, as well as the restrictive covenant, invalid, where the object of the purchaser is to accomplish control of the market, are consistent at least.

Perhaps the most effective answer to the holding in these cases is, that the validity of each contract of sale must be determined by the character and terms of the particular sale itself, apart from any question as to the situation or intention of the vendee, with which the vendor has nothing to do.[1] Unless all sales between competitors are to be held invalid, there is no sound principle upon which one contract for the sale of the whole or a part of an established business can be held valid, while an exactly similar contract of sale is held invalid for the reason merely that the vendee will thereby acquire control of some particular market. And the moment it is conceded that public policy is not opposed to the sale by any one of all of the business which he in fact owns upon the best terms obtainable, then a restrictive covenant which serves merely to assist in making the sale of that business and its good will must also be held valid and enforceable, whether the object of the vendee be to obtain a monopoly or not.[2] Such a restrictive covenant is not properly a contract in restraint of trade.[3]

In the ordinary case of the sale of a business, such as we have been considering, there can be no question of illegal combination as between vendor and vendee. There is no union of their interests; their interests are separate and distinct, if not opposed. But suppose the transaction involves more than a sale, and the relationship of the parties is not that of vendor and vendee merely. Suppose, in other words, that the sale is a part only of the whole transaction between the parties and is carried out in pursuance of some previous understanding or agreement for the combination or consolidation of their interests. What is to be said of the validity

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[1] Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 522; State *v.* Continental Tobacco Co., 177 Mo. 1.

[2] Camors-McConnell Co. *v.* McConnell, 140 Fed. Rep. 412; Davis *v.* A. Booth & Co., 131 Fed. Rep. 31, 37. But see Comer *v.* Burton-Lingo Co., 58 S. W. Rep. 969 (Tex.).

[3] This would appear to be the view taken by the New Jersey court in the Trenton Potteries Case, 58 N. J. Eq. 519.

In those states, such as Illinois and Ohio, where it is held that a restrictive covenant extending throughout the state is invalid, the result is that where the business does extend throughout the whole state a part of it is unsalable.

of the contract of sale,[1] and of the resulting union of interests between vendor and vendee, in such a case? There can be no successful attempt to answer these questions without first considering carefully the nature of contracts held invalid because limiting competition.

III.

So far we have considered the question of the validity of sales between competitors. Suppose, now, instead of a purchase by one competitor of the business and competition of his rival, the two parties enter into an agreement by which each is bound not to sell goods below a fixed price. This is the typical case of a contract now generally recognized as invalid because in restraint of trade. Why? It is important to consider the circumstances under which such contracts are made.

In such a case as that supposed, it is clear that if there is still a third competitor who is capable of supplying the particular market, then the parties to the contract would be delivering themselves into his hands by carrying out their agreement. In other words, such a contract would not be profitable for the parties, and could not successfully be carried out, unless all competitors likely to prove dangerous were bound by its terms. To take a simple example: suppose two laborers enter into an agreement by which they bind themselves not to work for less than ten dollars a day. Such a contract would have the effect only of depriving the parties thereto of work, and the public would be affected only on that account and to that extent. It would have no tendency by itself to

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[1] In Carter-Crume Co. *v.* Peurrung, 86 Fed. Rep. 439, where it was objected that a contract of sale was invalid for the reason that the purchaser was seeking to obtain control of the market, Judge Lurton said: "Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with Peurrung Bros. & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Co. understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices. The principle, if we admit that the purpose of the Carter-Crume Co. was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual."

See also Davis *v.* A. Booth & Co., 131 Fed. Rep. 31, 37, and Clancey *v.* Onondaga Fine Salt Mfg. Co., 62 Barb. (N. Y.) 395.

raise the level of laborers' wages. Only when laborers enter into such an agreement in such numbers that their services cannot be at once or readily replaced does such a contract tend to raise the level of wages. Consequently the laborers form unions, and do not undertake to regulate their wages by agreements amongst themselves until their numbers are sufficient to warrant such action.

But as the character of the labor increases in skill and the number of competitors decreases, the opportunity by agreement to control prices becomes greater. In More *v.* Bennett,[1] for example, the members of an association of stenographers engaged in court reporting, undertook, by agreement amongst themselves, to regulate the prices to be charged for such work, and the agreement was held invalid and unenforceable, although not all such stenographers were members of the association. Those who were, and who entered into the agreement, possessed, acting together, a control over prices which no one member had alone. As their number increased and the number outside of the association diminished, the greater became their power to regulate prices and the higher could they be made.

The situation as regards employers or manufacturers is the same. Contracts limiting competition are made between competitors who together are in a position to make their agreement to raise prices or limit output effectual and advantageous for themselves without regard to outside competition. A contract between two competitors who could not successfully maintain the prices agreed upon in the face of the competition of other rivals, would be a menace only to the business of the parties themselves.

It is clear, therefore, that a contract between rival manufacturers or traders, which has for its object the regulation or limitation of competition between them,[2] must be based upon such a present power to control the market as will make their agreement effectual. The purpose of the agreement can only be to make effective the control of the market which the parties already possess, provided the competition existing between themselves is eliminated. The parties enter into the agreements because they are in a position to regulate and control prices, make their agreements effectual, and

[1] 140 Ill. 69.

[2] Contracts between competitors relating to matters not the subject of rivalry between them would stand upon a different footing. See Gladish *v.* Kansas City Live Stock Exchange, 113 Mo. App. 726.

the courts hold the agreements invalid for that reason, because that is their only object. The question of the reasonableness of the agreements as between the parties, or the reasonableness of the prices agreed upon, has no place in determining the result. The principle is laid down generally that *all* such contracts are invalid as in restraint of trade, and obviously, unless the courts are prepared to determine the reasonableness of prices and charges of all kinds for all competitors, and hold *uniform* prices *reasonable* regardless of differences in the circumstances of competitors, there is no room for discrimination between them. There is no question here which a court can properly investigate and determine, such as is presented in the case of a restrictive covenant which assists in the sale of a business, where the court is concerned only with the character and extent of the particular business sold, and not with the reasonableness of any power to control prices which the vendee may thereby accomplish. An agreement limiting competition could be held reasonable only in case it were fruitless, and did not in fact accomplish that control over prices which was sought.

It should not be forgotten, also, that public policy demands, not merely present reasonable prices, but the continuous working of competitive conditions, and it therefore objects to the suppression of those conditions by an agreement between parties who have it in their power to determine prices in that way. Even public service corporations, which are entitled to charge only reasonable rates and are subject to governmental regulation in that respect, are nevertheless within the general prohibition of contracts in restraint of trade.[1] They may not by agreement substitute monopoly control in the place of competitive conditions which actually exist.

Where competitors, instead of agreeing not to sell below certain fixed prices, undertake to sell only at prices to be fixed by a committee of their representatives,[2] or form a pool, the agreement is still based upon the fact that the removal of competition between the contracting parties will enable them to maintain and control

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[1] U. S. *v.* Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505.

[2] Hooker *v.* Vandewater, 4 Den. (N. Y.) 349; Stanton *v.* Allen, 5 Den. (N. Y.) 434; Craft *v.* McConoughy, 79 Ill. 346; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Nester *v.* Continental Brewing Co., 161 Pa. St. 473; U. S. *v.* Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505.

prices, in spite of such other competition as there may be, as no one of the competitors could have done alone. Unless the parties possess that power of control their agreement is a useless one. But by means of such a contract between parties who already dominate the particular trade or industry, the usual course of competition is arrested in the supposed interests of all, and their control of the market made effectual.

It is clear that in these cases there is no sale of business by one competitor to another. There is no agreement on the part of one party to discontinue his competition so that the business of another may be increased, and no one of the parties, by means of the agreement limiting competition, acquires any business of any one of the other competitors. That is not the object of the contract. On the contrary, the object is to preserve the business of each party by eliminating certain risks of competition. The business of each is continued as before subject to a uniform restriction upon the freedom of competition. There is an abandonment of competition by all, but no abandonment of existing business by any. The purpose of the agreement is simply and solely to eliminate competition between parties who already dominate the particular trade or industry, and substitute in its place an effectual control of the market by those parties, relieved, for the time being at least, from the danger of other serious competition.

A recent case in Alabama[1] illustrates strikingly the object of contracts limiting competition, and indicates the distinction between such contracts and agreements for the sale of the whole or a part of a business. In that case two ice manufacturing companies, who were at the time the only parties engaged in the ice business in the city of Tuscaloosa, entered into an agreement which provided that one of them, in consideration of certain payments to be made from time to time by the other, should close its manufacturing plant for five years, or until sold to a third party. But it was provided that after a certain amount was paid the agreement should be cancelled in case another competitor opened an ice factory in the city.

The contract, it will be seen, did not involve an absolute purchase, or even lease for a definite term, of the business of one of the parties. On the contrary, it was a contract between two

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[1] Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110.

competitors who at the time had control of their market for the purpose of eliminating competition between them and giving to both the advantage of the resulting monopoly so long as that monopoly continued. Performance, by the terms of the contract, was conditional upon the maintenance of the monopoly, so that both parties contracted with that object in view. The moment the agreement became disadvantageous by reason of other competition entering the field, it was to be discontinued. The price to be paid made the closing of its plant profitable to the one party, and the other could afford to pay that price as long as it retained absolute control of the market, but no longer. An agreement to raise prices might have accomplished the same result, though perhaps it would have offered greater temptation to others to enter the business.

The case indicates how narrow the line may sometimes be between agreements restricting competition between competitors for the purpose of establishing their control of the market, and the sale of a business by one competitor to another where the object of the purchaser may be to accomplish *for himself* a like monopoly of the particular business.[1] The contract limiting competition is terminated when it no longer accomplishes its object, and each party continues his business as before; but in the case of the sale the transfer of the business of one party to the other is effected once and for all, whether control of the market is in fact accomplished by the purchaser or not.[2] If the business is transferred and the seller is paid his price, the rest is of no consequence to him, and no room is left for restoring the situation which existed before the sale. And that would be true, it is submitted, even in the case of an agreement which provided that the seller should receive for the sale of his business a share in the profits of the business of the purchaser. But that suggestion leads obviously to the consideration of the question of the legality of a union or combination of competing interests in the form of a partnership or corporation.

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[1] See, for example, Clark *v.* Needham, 125 Mich. 84, and Clemons *v.* Meadows, 94 S. W. Rep. 13 (Ky., 1906), cases which are not, at least, clearly reasoned.

[2] A lease, for instance, which is not by its terms dependent upon the purpose or object of the lessee, is not rendered invalid by the fact that the lessee was seeking to obtain a monopoly. United States Chemical Co. *v.* Provident Chemical Co., 64 Fed Rep. 946, 950.

IV.

We have seen that two independent competitors, not in a position to control to some extent the supply of their product, could not, by means of a contract limiting competition between themselves, effectually raise the selling price of the commodity manufactured by them. The contract, so long as adhered to by the parties, could operate only to the advantage of their competitors. These two parties might, however, unite their interests in some form, by means of a partnership, corporation, or other association, and in that way suppress competition between themselves and act together in competition with other competitors. This union of interests might be an advantage to both in the competitive struggle. Increased size is of itself a weapon of competition which is the more appreciated as competition becomes keener and the margin of profit narrower. But the union of two such interests would not give to the combination any greater immediate control over the supply or the selling price of their product than would the contract limiting competition between them as independent dealers.

Suppose, however, parties who have made, and who have been able to maintain successfully, an agreement limiting competition between themselves, unite their interests in a partnership or corporation. The contract, as we have seen, would have been held invalid as in restraint of trade. Would the union of interests of such parties in the form of a partnership or corporation be invalid also, and constitute the partnership or corporation itself an illegal combination?

It should be noticed, in the first place, that, under the common law decisions, the question of whether a corporation was in itself an illegal combination could hardly have arisen. Contracts restraining trade or limiting competition were not unlawful at common law in the sense of being criminal, and did not afford third parties any right of action. They were simply unenforceable.[1] The courts, consequently, never dealt with anything but the validity or

[1] Hilton *v.* Eckersley, 6 E. & B. 47; Hornby *v.* Close, 2 Q. B. 153; Farrer *v.* Close, 4 Q. B. 602; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, [1892] A. C. 25; Ætna Insurance Co. *v.* Commonwealth, 106 Ky. 864; Brown & Allen *v.* Jacobs Pharmacy Co., 115 Ga. 429, 437–438; Queen Insurance Co. *v.* State, 86 Tex. 250, 272; State *v.* Huegen, 110 Wis. 189, 251–253; Howardson *v.* Coal Co., 111 Wis. 545, 549–550; Live Stock Com. Co. *v.* Live Stock Exchange, 143 Ill. 210, 233; Dickinson *v.* Board of Trade, 114 Ill. App. 295, 304; U. S. *v.* Addyston Pipe & Steel Co., 85 Fed. Rep. 271, 279; Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 405.

invalidity of some obligation sought to be enforced between the parties before it, and if that was contrary to public policy as being in restraint of trade, the court left the parties where it found them. Courts might refuse to enforce contracts tending to a monopoly, but they did not deal with monopoly as an accomplished fact within the power of a single person or recognized legal entity. If two or more competitors transferred their interests to a corporation, in pursuance of some agreement between themselves, there was an end of that transaction. No court could be called upon afterwards to decide whether that original agreement was valid or invalid, because validity meant enforceability, and there was nothing left to enforce. There could be no question of an agreement in restraint of trade between stockholders as such, who had no other relations with one another and who did not continue in business as individuals. And the corporation did not become a criminal organization merely because it was formed by a union of competing interests, even though it might accomplish the same result as a contract limiting competition between the same parties, which the courts would not have enforced. The contract, like the corporation, accomplished its purpose if carried out.

But the anti-trust acts have in most instances changed the situation in such respects. The Sherman Act, for instance, makes the entering into contracts in restraint of trade criminal, and likewise affords a criminal action against all combinations "in the form of trust or otherwise" in restraint of trade. The question for the courts, under such a statute, is no longer merely one of refusing aid to enforce contracts tending to some particular result on the ground that the object sought is against public policy; the statute makes the contract and the combination in themselves criminal.

The majority of the Supreme Court in the Northern Securities case[1] considered that the result reached in that case was controlled by the decisions in the earlier cases in that court which had arisen under the Sherman Act,[2] in which contracts limiting competition were held illegal, since it was apparently an attempt to accomplish the same result that was aimed at in those cases, only by a different means. On the other hand, it was objected that such a union of competing interests in a form of organization authorized by law could not be held to constitute an illegal combination without

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[1] 193 U. S. 197.

[2] U. S. *v.* Freight Ass'n, 166 U. S. 290; U. S. *v.* Joint Traffic Ass'n, 171 U. S. 505; and Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211.

holding, as a logical consequence, all partnerships or corporations, which necessarily united actual or potential competing interests and limited or suppressed competition to that extent, likewise illegal.

From the examination already made of contracts limiting competition, and the circumstances under which they are made, it is clear that if illegal mergers of competing interests be limited to those cases where the object of the merger is to accomplish a result which could have been attained by means of a contract limiting competition between the parties, then it will not be necessary to hold all partnerships and corporations illegal. Partnerships and corporations may be formed by parties who could not successfully maintain a contract limiting competition, and who could therefore not have had in view the control of any market as the sole or main reason for forming their organization. They may be the result of entirely new enterprise, and not accomplish the merger of any businesses previously established. The step which is taken, therefore, in holding such mergers illegal as accomplish the same result between the parties as could have been, or was already, accomplished by a contract limiting competition between them, does not involve holding all mergers of even existing competing interests in an otherwise authorized form of organization illegal. And it is clear that the Supreme Court does not consider that its decision in the Northern Securities case involves holding all partnerships and corporations illegal combinations. In a later case,[1] involving the constitutionality of the Texas anti-trust act, it was urged by counsel that the act in question made all union of business interests between individuals illegal, and Mr. Justice McKenna, in reply to that contention, says:

"To support the argument the usages and necessities of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things that counsel easily demonstrate. They easily demonstrate that some combination of 'capital, skill or acts' is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of actions, and to limit too much the function and power of government. . . . It is certainly the conception of a large body of public opinion that the control of prices

[1] National Cotton Oil Co. *v.* Texas, 197 U. S. 115, 129.

through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other states and in a well-known national enactment. According to them, competition, not combination, should be the law of trade."

But although it may thus be shown that the logic of the decision in the Northern Securities case does not necessitate the holding of all partnerships and corporations illegal combinations, it is not so easy to apply a test by which to determine what combinations are and what combinations are not illegal. In the case of the contract between independent competitors limiting competition between them, as we have seen, the contract itself by its very existence, and the fact that it is maintained, proclaims a control of the market by the parties sufficient to make the agreement effective. If the parties have miscalculated their power, it is at least a simple matter to terminate the agreement. Neither party in such case would call upon a court to enforce it. All such contracts, therefore, are held illegal because they all have the one illegal purpose. But if all mergers are not to be held illegal, it becomes necessary to distinguish between the good and the bad. The illegal merger does not proclaim itself by its existence merely. The object sought is not always apparent in the fact of merger or in its immediate results. Indeed, we know as a matter of history that some mergers, having for their object the control of some particular market, have miscarried by reason of some miscalculation or unforeseen competition left on the outside. And, as the decisions hold, the fact that the combination has not exercised the power of raising prices, which it in fact possesses, is immaterial if it has the power. The power is the evil thing, and this must in some way be shown to exist.

Admitting, however, that the essential characteristic, both of contracts limiting competition and of illegal combinations, is effective control of the market by the parties — that both contract and in some cases merger are bad because by means of them the parties accomplish that result — then is such control of the market in itself not merely a test in particular cases, but a sign in all cases of the existence of an illegal combination or monopoly, and must all partnerships and corporations be held illegal combinations which can be proved at any time to possess such power of control over the situation in the particular market in which they operate? Or is control of the market in itself of no consequence, and does it become of consequence only when accomplished in a particular way — by means of contract between existing competitors or a union of such competing interests?

It was objected at the time of the decision in the Northern Securities case that in such a case of merger the original illegal agreement between competitors, if there was one, was terminated by the time the scheme for the consolidation of competitive interests was perfected, — the new corporation created and placed in control of the former competitors, — and that thereafter there was nothing to be objected to but the fact that one large corporation did in reality control interests formerly existing in two independent corporations. The new corporation, it was said, could not be an illegal combination because its members were once competitors, particularly where not all of the members of the new corporation were formerly competitors and parties to the original agreement or arrangement. Mr. Morawetz, to avoid that difficulty, has suggested [1] that the only view on which the new corporation, as in the Northern Securities case, can be considered an illegal combination is by regarding the members of that corporation, whether all or any of them were competitors before or not, as becoming an illegal combination by reason of the acquisition of a controlling interest in the two competing companies. This would be an entirely new combination, wholly apart from the earlier one, and the new corporation, legal when formed, would become illegal only upon the acquisition of, and by reason of acquiring, control of the two competing companies.

It may be open to question if Mr. Morawetz's theory really avoids the particular difficulty which suggested it, inasmuch as the

[1] The Anti-Trust Act and the Merger Case, 17 HARV. L. REV. 533.

new corporation would continue to be an illegal combination, subject to attack on account of the original purchase, in spite of subsequent changes in its membership and in the operation or extent of its business. But, in any event, if it is true that a corporation which acquires the control of two competing companies thereby becomes an illegal combination, then why does that result not follow from any purchase by one corporation of the business of another? In such a case the stockholders of the purchasing corporation have combined to remove a competitor from the field and leave only one in the business to control the two properties, and if that constitutes the purchasing corporation an illegal combination, then all sales of business by one competitor to a competing partnership or corporation would involve that result, and no sale to such a purchaser could be valid. The sale itself must be against public policy, if that alone is to make the purchaser an illegal combination. It cannot be legal for the seller to sell, and at the same time illegal for the buyer to buy. But we have already seen that not all sales between competitors are invalid, and that the better view, and the tendency of the most recent cases, is to hold such sales not invalid even when the purchaser may thereby acquire control of the market. Not the sale, therefore, in any event, could constitute the purchaser an illegal combination, but such a result must follow, if at all, from the fact of the purchaser's actual control of the market; and the sale would be looked to only for the purpose of establishing that fact.

Does control of the market, then, by itself, constitute the corporation shown to possess such control an illegal combination? In Whitwell *v.* Continental Tobacco Company,[1] the Circuit Court of Appeals for the Eighth Circuit held, in a case arising under the Sherman Act, that a corporation, which was admitted to control almost the entire market of the country in certain particular lines of goods, might legally refuse to sell customers upon profitable terms unless they would contract for all their requirements and agree not to buy competing goods of competitors. That an action for damages under the Sherman Act could be maintained on account of such a refusal to sell by a combination of competitors is shown by a still more recent decision by the Circuit Court of Appeals for the Ninth Circuit,[2] and the court in the Tobacco case

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[1] 125 Fed. Rep. 454.

[2] Ellis *v.* Inman, Poulsen & Co., 131 Fed. Rep. 182. See also City of Atlanta *v.* Chattanooga Foundry & Pipe Works, 127 Fed. Rep. 23.

admits that if a combination of competitors had been shown to exist in that case the result would have been different. The decision, therefore, of the same court which first decided the Northern Securities case is that substantial control of the market does not of itself constitute a corporation an illegal combination.

But if not all partnerships and corporations which have control of some market are illegal combinations, and if the sale of a business by one competitor to another is not illegal and does not of itself constitute a purchasing corporation an illegal combination, even though the purchaser may thereby acquire control of the market, how is it to be determined what combinations are and what combinations are not illegal? That must depend, apparently, upon the facts and circumstances surrounding and determining the origin of the particular combination. There appears to be no escape from that conclusion. To be illegal, the combination must rest upon an understanding or agreement between actual competitors who, by removing competition between their established independent enterprises, are able at the time to control the market or industry in which they are engaged. A sale by one rival to another is one thing; but an agreement between competitors to surrender control over their properties and transfer them to one and the same corporation or organization, where each transfer is conditional upon a similar transfer by each of the other competitors and parties to the arrangement, and where the consideration for each transfer is the acquirement of an interest by the seller in the new organization which will have control of all the former competitors, is a different thing. This arrangement may be effectuated by means of a sale (a sale of stock, as in the Northern Securities case), but there is something more than a series of independent sales.

The result is that where competitors enter into an illegal agreement or undertaking to eliminate competition between themselves, and give to their united interests an effectual control of the market in which they operate, the whole transaction by means of which that object is accomplished is illegal. It may be enjoined at the outset,[1] and if carried out, the combination which results is an illegal monopoly.[2] The explanation of this result of the cases appears to be that public policy, as expressed in the statutes, aims to se-

[1] Harding *v.* American Glucose Co., 182 Ill. 551, 599.

[2] Distilling & Cattle Feeding Co. *v.* People, 156 Ill. 448; Bishop *v.* American Preservers' Co, 157 Ill. 284; National Lead Co. *v.* Grote Paint Store Co., 80 Mo. App. 247; Northern Securities Co. *v.* U. S., 193 U. S. 197.

cure the preservation of the competitive system, and increased size sufficient to give control of the market which is the result of success in the competitive struggle, the constant and continued aim of each competitor, cannot, at a certain point, be held illegal without depriving competition itself of its incentive. But, on the other hand, to allow size which gives control of the market to be accomplished, not through successful individual competition, but through the method of agreement or union between competitors, is to destroy at one stroke competition as it then exists and substitute a present monopoly in its place.

V.

Such seems to be the conclusion of the matter in regard to illegal combinations from the cases as they now stand. Necessarily, the only remedy which will terminate an illegal combination in the form of a corporation is some order, such as was entered in the Northern Securities case, aiming at the destruction of the power of control which the combination of competitors has established. Any attempt to restore the exact situation existing before the combination was formed would in most cases be impossible, and the parties themselves cannot claim such restoration as a matter of right.[1] Nor would it be possible in most cases to resolve the combination into its original competing elements. The two railroads in the Northern Securities case retained their identity as railroad properties, and the original corporations continued in existence; [2] but in the case of many consolidations the old corporations go out

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1 Harriman *v.* Northern Securities Co., 197 U. S. 244. For a case suggesting that the state might compel a reconveyance of the properties sold, see State *v.* Chemical Co., 71 S. C. 544.

2 The Northern Securities decision does not rest, however, on the ground merely that the new company acquired and held the stock of the Great Northern and Northern Pacific Railroad Companies, and that only in the case of such a holding company (the identity of the original competitors continuing to be distinct) would the transaction be declared illegal. On the contrary, Mr. Justice Harlan emphasizes the fact that the new corporation had complete control of the situation for all purposes, and that the transaction was illegal *because* the union of interests was as effectual as if both lines of railroad were "held in one ownership," and because "the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, *one powerful consolidated corporation*," etc.

In other words, the holding company is an illegal combination because it has as complete control of the competing interests as a single corporation which should take the place of both of the others upon their dissolution. It is not illegal merely because it

of existence, and the original competing properties may be completely modified and some entirely abandoned. In any event, the court could not compel the parties to resume a competition which had been abandoned. Obviously, under such circumstances, all that the court could do would be to attempt to destroy the power of control over prices or rates which the union of competitive interests had accomplished by enjoining the continuation of the particular combination. If the corporation could show when attacked that it did not possess any greater power to control prices than was possessed by some one of the original competitors, apparently no relief could be had against it. Evidently the merger did not have greater control over prices for its object, or that object was not accomplished, or the power had since been lost, and no evil requiring a remedy remained.

And in the case of most consolidations, particularly of industrial corporations, where the conditions of business are more or less unstable, subject constantly to the uncertainties of new and improved methods and other unexpected developments, the exact situation as it existed at the time of the combination is quickly left behind. Monopoly, or control of the market in the view here considered, is necessarily an entirely relative matter. A particular combination may obtain greater power of control over the market than was possessed by any one of the united competitors before the union, but just so may a single successful business advance from time to time its situation in the market and increase its power to determine prices. It is a matter of more or less from time to time, and conditions as they existed before a union of competing interests cannot long serve, in many lines of business, as a standard of comparison by which to determine the degree of control over prices possessed at a subsequent time by the particular combination. A union of competing interests in the form of a corporation may acquire the power to fix prices in the same way that they could have been determined by contract between the competing parties, but, just as in the case of an absolute sale by one competitor to another, the consolidation accomplishes more than that. The contract limiting competition or fixing prices has only that for its object, and its termination carries nothing else with it. But the corporation has a right to exist unless illegality has been its essential characteristic

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is a holding company. Some holding companies, as well as some other corporations, may not be illegal combinations. If two corporations may lawfully unite their interests, there can be no objection to their doing so by means of a holding company.

from the beginning. In what period of time, or through what change of circumstances, may a union of competing interests in the form of a corporation hope to be born anew and escape the danger of suffering dissolution on account of its original sin?

Furthermore, if the distinction between valid sales of business between competitors and illegal combinations is to be maintained, a further difficulty is presented in the case of those consolidations which are a compound of sales and combinations. In the organization of many of the industrial trusts there is an absolute purchase and sale of some plants, and what may strictly be a union or combination of interests in the case of others, but any substantial control of the market may not be accomplished without the properties purchased. If neither the combinations nor the sales, considered separately, are illegal, what is to be said of the final result?

Suppose that three wealthy men should agree each to purchase a controlling interest in one of three competing companies which dominated or controlled the market in some line of business, and should bind themselves to unite their separate interests subsequently by means of a partnership or corporation. There can be no doubt that the agreement would be illegal, and that the resulting corporation would be an illegal combination within the meaning of the authorities. Would the result be different if the partnership or corporation were first formed, with the same ultimate purpose in view, and its combined capital employed in the purchase one by one of a controlling interest in the three competing companies? The separate sales in either case might be perfectly valid, the different vendors having no part in the combination; but might not the men who combined their capital to accomplish the combination of existing competing interests be held, in the second case as well as in the first, to be parties from the beginning to an illegal combination? Such a combination would certainly fall within the prohibition of such statutes as the Texas anti-trust act, which defines a trust as a combination of capital, skill, or acts by two or more persons, corporations, etc., for the purpose of suppressing or lessening competition. The corporation would be an illegal combination from the beginning, because formed for an illegal purpose — to secure a monopoly by means of a union of competing enterprises.

It would follow, also, that a corporation formed by a combination of part of the competitors in a particular line of business, with the intention that the combination should purchase the

business of enough of the remaining competitors to enable it to dominate the market, would also be an illegal combination from the beginning. And so in the Northern Securities case both the Circuit and Supreme Courts held that the Northern Securities Company was from the outset, and prior to its purchase of control of the two railroad companies, an illegal combination.

This view, as was shown in discussing Mr. Morawetz's contention, does not involve holding that a corporation, legal when formed, will become an illegal combination if, in the course of its business, it purchases a competing enterprise, even though such purchase may give it for the time being a substantial monopoly. The line is drawn between combinations formed for the purpose of securing a monopoly by means of the union of existing competing interests, and monopoly which is the result of the growth or development of a single business, whether carried on by an individual or a corporation. If, in the case of every business enterprise, conspicuous success in the competitive struggle were to result only in illegal monopoly, the value of the competitive system would be impaired.

It is clear, however, that some monopolies must be tolerated unless all roads leading to monopoly are closed. If that cannot be done without interfering with the ordinary methods of competition, then the only course left is, not to prohibit altogether size which gives control of the market, but to restrict the uses which may be made of size and limit the competitive power of size to perpetuate itself regardless of the interests of the general public. The success of a competitor, where competition is still active, is the gain of the purchasing or consuming public. But success which is so secure that the public may be disregarded must be controlled. The competitive system is maintained, not merely for the benefit of the successful competitor, but to serve the welfare of the whole community. The public is interested, not in the success of any one competitor, but in the continuous and effective operation of free competition, active and potential. When such restraining influences are no longer effective, so that the interests of the successful competitor and those of the public no longer correspond, the public interests must be protected in some other way. It may then become necessary by means of legislation to control the power and regulate the conduct of all large corporations, no matter what their past history.

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